In the Supreme Court of the United States

OCTOBER TERM, 1965

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

ANTHONY L. FABRIZIO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

OPINION BELOW

The order of the district court dismissing the indictment (Appendix, p. 11, *infra*) is not reported.

JURISDICTION

On October 5, 1965, the district court dismissed the indictment on the ground that it did not charge an offense within the purview of 18 U.S.C. 1953 as disclosed in the legislative history of that statute (R. 1, 12). A notice of appeal was filed on November 4, 1965. The jurisdiction of this Court to review on direct appeal a judgment dismissing an indictment on the ground that it does not charge an offense within the meaning of the statute upon which it is

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founded rests on 18 U.S.C. 3731. *United States* v. *Sampson*, 371 U.S. 75.

STATUTE INVOLVED

18 U.S.C. 1953 provides in pertinent part:

> (a) Whoever, except a common carrier in the usual course of its business, knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a numbers, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both.
>
> (b) This section shall not apply to (1) parimutuel betting equipment, parimutuel tickets where legally acquired, or parimutuel materials used or designed for use at racetrack or other sporting events in connection with which betting is legal under applicable State law, or (2) the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a State in which such betting is legal under the statutes of that State, or (3) the carriage or transportation in interstate or foreign commerce of any newspaper or similar publication.

* * * * *

QUESTION PRESENTED

Section 1953 of the Criminal Code prohibits knowingly carrying in interstate commerce "any record, paraphernalia, ticket, certificate, bills, slip, token,

paper, writing, or other device used, or to be used, or adapted, devised, designed for use in * * * wagering pools with respect to a sporting event." The question presented is whether an indictment alleging the knowing carrying in interstate commerce from New Hampshire to New York of acknowledgements of purchases of chances on a sweepstakes race to be conducted in the State of New Hampshire charges an offense under the statute.

STATEMENT

On September 3, 1964, an indictment was returned in the United States District Court for the Western District of New York charging (R. 1–2):

> That on or about the 24th day of August, 1964, ANTHONY L. FABRIZIO, knowingly did carry in interstate commerce from Keene, State of New Hampshire to Elmira, State of New York, in the Western District of New York, records, papers and writings, to wit: 75 acknowledgements of purchase for a sweepstakes race of the State of New Hampshire, to be used, and adapted, devised and designed for use, in a wagering pool with respect to a sporting event, that is: a sweepstake race of the State of New Hampshire, as he then well knew; all in violation of Section 1953 of Title 18, U.S.C.

In response to a motion by appellee, the United States on September 25, 1964, filed a bill of particulars, which stated (R. 5):

* * * * *

> 2. It is not charged by the United States that the defendant violated any State law, ordi-

nances or rules. The United States charges that the defendant violated § 1953, Title 18, United States Code.

On October 13, 1964, appellee moved to dismiss the indictment on the ground that the indictment and bill of particulars did not state facts sufficient to constitute an offense against the United States (R. 2–5). The grounds for the motion were set forth in a supporting affidavit of one of appellee's attorneys (R. 6–10). The affidavit, which admitted the carrying of the 75 written acknowledgements of purchase, argued that appellee's actions did not fall within the purpose of the statute, as revealed by its legislative history, "to provide means for the Federal Government to combat interstate crime and to assist the state in the enforcement of their criminal laws by prohibiting the interstate transportation of wagering paraphernalia" (R. 7). It was alleged that appellee was not connected with organized crime, but had been an employee of a newspaper for thirty-nine years; that the State of New Hampshire, subsequent to the enactment of Section 1953, had instituted a State lottery; that appellee had not violated any laws of the States of New Hampshire, Vermont or New York; and that the acknowledgements which he carried were not wagering paraphernalia since the ticket remained in the State of New Hampshire.

On October 5, 1965, the district court sustained the motion, holding that "[t]he charge in the indictment does not come within the purpose of Section 1953 of Title 18, United States Code, as disclosed in the legislative history of the Act." (R. 12.)

THE QUESTION IS SUBSTANTIAL

The district court, on motion of appellee before trial, dismissed an indictment which charged appellee with having knowingly carried from New Hampshire to New York, in violation of 18 U.S.C. 1953, 75 acknowledgments of purchase for a sweepstakes race conducted by the State of New Hampshire. As the basis for its action, the court stated only that the charge in the indictment was not within the purpose of Section 1953 as disclosed by the legislative history. That section (so far as is pertinent here) provides criminal penalties for knowingly carrying in interstate commerce any record or other device intended for use in a wagering pool with respect to a sporting event. Appellee's motion to dismiss the indictment was based on a number of separate grounds, and it is not clear which the district court adopted. We submit that there was no valid ground for dismissal and that the decision below is therefore erroneous; we so demonstrate in the next part of our discussion with a point-by-point refutation of the grounds urged to the district court by appellee. We submit, further, that review by this Court is clearly warranted to correct the unduly restrictive construction placed by the district court upon Section 1953. The effectiveness of this newly enacted provision for the control of interstate gambling operations would be gravely impaired were that court's view of the statute's scope to prevail.

1. Appellee seems to have argued, and the district court may have agreed, that the indictment was defective because the purpose of Section 1953 is to

combat organized crime and appellee was not alleged to be a professional criminal or a member of a gambling syndicate. Not only is there no basis in the language of the statute for requiring proof of affiliation with organized crime to make out an offense, but to inject so vague an element into the definition of the offense would create the gravest practical and constitutional problems. Further, the legislative history makes clear that while one (but by no means the only) concern of Congress was with the gambling operations of criminal rings, the net of liability was intended to be cast wider and embrace all persons within the literal terms of the statute unless covered by one of the express statutory exceptions. See Hearings on H.R. 468 before Subcommittee No. 5 of the H. Committee on the Judiciary, 87th Cong., 1st Sess., pp. 50–51. The background of the enactment reinforces this reading. Congress, in Section 1953, was not breaking new ground. It was seeking merely to tighten up existing federal legislation (18 U.S.C. 1301–1304) which forbade the use of the facilities of interstate commerce to promote gambling. See H. Rep. No. 968, 87th Cong., 1st Sess., p. 2. No such legislation had ever been limited to persons connected with organized crime.

2. Appellee also argued that Section 1953 does not apply to a lottery which, like the New Hampshire sweepstakes, is legal in the State where held. The statute, however, is not so limited, and its careful pattern of exceptions indicates that no such limitation was intended. Subsection (b)(1) carves out an

exception, inapplicable here, for parimutuel[1] betting permitted under the laws of the State where conducted, and (b)(2) exempts the transportation of betting materials "*into* a State in which such betting is legal under the statutes of the State" (emphasis added). However, nowhere does the statute permit the transportation of non-parimutuel betting materials *from* a State in which such materials are legal. The distinction here drawn by the statute is obviously as deliberate as it is proper: If betting materials were freely transportable from States where they were legal to those where they were illegal, the public policy of the latter States would be undermined.[2] See *Lottery Case,* 188 U.S. 321, 356; cf. U.S. Const. Amend. 21. Finally, it is clear from the legislative history that Congress both knew that there were some State-sanctioned gambling operations and intended that the transportation of the paraphernalia of such operations into States where they were not legal be prohibited. House Hearings, *supra,* p. 344; Hearings on S. 1653

[1] *I.e.*, on-track. See *Mattson* v. *Hollywood Turf Club*, 101 C.A. 2d 215, 219, 225 P. 2d 276, 278.

[2] It appears that New York, the State into which appellee is alleged to have carried the sweepstakes acknowledgements, does forbid this kind of lottery. See New York Penal Law §§ 975, 1371, 1373, 1382. But the government, of course, was not required in the indictment to allege that a statutory exception was inapplicable. See *McKelvey* v. *United States*, 260 U.S. 353, 357; *Edwards* v. *United States*, 312 U.S. 473, 482–483. The statement in the government's bill of particulars to the effect that appellee was not charged with any State-law violation was, of course, not an admission that his conduct violated no State law, but an assurance that the indictment, brought as it was by the United States, charged only a federal offense.

before the S. Committee on the Judiciary, 87th Cong., 1st Sess., pp. 293–294.

3. A related contention—suggested, if not fully elaborated, in the affidavit supporting the motion to dismiss—is that Section 1953 cannot have been intended to forbid a State-operated lottery established after the passage of the statute. But sweepstakes were familiar to the draftsmen of Section 1953, and the chief of the Justice Department's Criminal Division specifically stated that they would be included in the concept of a "wagering pool with respect to a sporting event" (House Hearings, *supra*, p. 352); nor is there any indication that Congress meant to confine the statute to existing sweepstakes.

If appellee's contention is that the New Hampshire sweepstakes has peculiar attributes which make it not a wagering pool with respect to a sporting event within the meaning of the statute, that is a matter of proof to be developed at trial. Such a contention does not go to the sufficiency of the indictment to charge an offense under the statute—the only issue before the district court on appellee's motion to dismiss. See *United States* v. *Petrillo*, 332 U.S. 1, 5.

4. Finally, appellee contended that the "acknowledgements of purchase" to which the indictment refers are outside the scope of the statute since the actual sweepstakes ticket never leaves New Hampshire. However, the very fact that the formal sweepstakes ticket is sold only in New Hampshire and remains there suggests that the acknowledgement of purchase is the out-of-State customer's receipt for the ticket which is purchased in his name by ap-

pellee, and hence is an integral part of the gambling transaction. But even if, as appellee argues, the sole purpose of the acknowledgement is to ensure that the name and address of the ticket holder are correctly registered with the New Hampshire lottery commission, the acknowledgement would still fall within the comprehensive statutory language of "any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in" a wagering pool with respect to a sporting event. At all events, the question whether these acknowledgements of purchase are in fact gambling paraphernalia, as alleged in the indictment, is plainly one for the trial.

CONCLUSION

Probable jurisdiction should be noted and the judgment of the district court reversed.

Respectfully submitted.

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